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No. 82-1579

IN THE

# Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
*Appellant,*

and

STATE OF MINNESOTA,
*Appellant/Intervenor,*

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## JOINT SUPPLEMENTAL MEMORANDUM OF APPELLANT AND APPELLANT-INTERVENOR AND APPENDIX

ROBERT S. ABDALIAN
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
Telephone: (507) 288-5567
*Attorney for Appellant, Hayfield Northern Railroad Company, Inc.*

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
and
GILBERT S. BUFFINGTON
Special Assistant Attorney General
*Attorney for Appellant/ Intervenor State of Minnesota*
204 State Administration Bldg.
Saint Paul, Minnesota 55155
Telephone: (612) 296-0315

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## JOINT SUPPLEMENTAL MEMORANDUM OF APPELLANT AND APPELLANT-INTERVENOR AND APPENDIX

## INTRODUCTION

Appellant and appellant-intervenor are filing this supplemental memorandum to apprise the Court of the recent decision of the Interstate Commerce Commission (ICC) entitled *Chicago and North Western Transp. Co.—Abandonment in Waukesha, Jefferson and Dane Counties, Wisconsin*, Docket No. AB-1, (Sub-No. 144) (Decided May 5, 1983, Served May 13, 1983). This decision, set forth in the supplemental appendix to this memorandum (Supp. App. A-1), directly conflicts with the decision of the Eighth Circuit in this case and contradicts the Eighth Circuit's surmise of the ICC official position on the question raised in this appeal: Whether state power of eminent domain may be exercised on abandoned property that once was a rail line regulated by the federal government.

### I. THE POSITION OF THE HAYFIELD NORTHERN AND THE STATE OF MINNESOTA IS CONSISTENT WITH THE INTERSTATE COMMERCE COMMISSION'S AUTHORITATIVE CONSTRUCTION OF THE INTERSTATE COMMERCE ACT.

#### A. The Court Should Defer to the Agency's Interpretation of Its Own Statute.

It is well established that in questions of statutory construction, the interpretation of the agency charged with administration of the statute is entitled to great deference. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969). See also *Miller v. Youakim*, 440 U.S. 125, 145, fn. 25 (1979).

Such deference is particularly necessary where, as here, the agency is taking the first step toward implementing a new approach to regulatory reform mandated by Congress, *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Atchison, Topeka & Santa Fe Railway v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978), and when agency interpretation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (per Justice Cardozo). Accordingly, courts should await agency determination before deciding matters that lie within the expertise of the agency in order "to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498-499 (1958); see also *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

The Eighth Circuit recognized in this case that deference was to be accorded to the ICC as the agency entrusted with enforcing the Interstate Commerce Act because it grounded its decision below in part on what it believed the ICC position to be. The Commission decision of May 5, 1983, proves, however, that the Court interpretation was erroneous.

**B. The Interstate Commerce Commission Has Formally Rejected the Holding of the Circuit Court of Appeals for the Eighth Circuit in this Matter.**

In *Chicago and North Western Transp. Co.—Abandonment in Waukesha, Jefferson, and Dane Counties, Wisconsin*, Docket No. AB-1, (Sub-No. 144) (decided May 5, 1983, served May 13, 1983) (Supp. App. A-1), the Commission was asked by the Wisconsin Department of Transportation whether an abandonment of a rail line would have any impact on the State's power of eminent domain as to that rail line in light of *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d 819 (8th Cir. 1982), the decision below. The Commission, rejecting the Eighth Circuit decision, stated:

> We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is effective, federal interest and Commission jurisdiction end. (Supp. App. A-5)

This Commission decision is in direct conflict with the decision of the court of appeals below.

## CONCLUSION

The May 5, 1983, decision of the ICC makes plenary consideration by this Court even more appropriate than before.

Respectfully submitted,

By: ROBERT S. ABDALIAN
WARD, GRAY & OEHLER, LTD.
Attorney for Hayfield Northern Railroad Company, Inc.
103 Omni Building
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
Telephone: (507) 288-5567
HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
By: GILBERT S. BUFFINGTON
Special Assistant Attorney General
State of Minnesota
204 State Administration Bldg.
Saint Paul, Minnesota 55155
Telephone: (612) 296-0315
Attorneys for Appellant and Appellant/Intervenor

May 27, 1983

# APPENDIX

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 144)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—IN WAUKESHA, JEFFERSON AND DANE COUNTIES, WI

Decided: May 5, 1983

Chicago and North Western Transportation Company (C&NW) seeks a certificate of public convenience and necessity permitting the abandonment of 48.2 miles of its railroad line between milepost 20.6 near Waukesha, WI and milepost 71.0 near Cottage Grove, WI. The abandonment would not include the 2.2-mile segment between milepost 47.8 and milepost 50.0 near Jefferson Junction, WI.

Public notice of the abandonment application was served, posted, and published by C&NW in accordance with the notice requirements set forth in 49 U.S.C. §10904(c)(1). Protests were timely filed by Miller Grain Drying and Storage, Inc., Lake Mills Feed & Grain, Inc., Farmers Union Central Exchange, Inc. (CENEX), Gordon Gottschalk, City of Lake Mills, WI, Town of Cottage Grove, Pat N. Burgett, County of Jefferson, Village of Dousman, Farm Better Service, Inc., and Crepaco, Inc., while comments were submitted by Walter F. Zahn, Timberline, Incorporated, and Wisconsin Department of Transportation (WisDot). In addition, the Brotherhood of Railway Carmen of the United States and Canada (BRC) and the Railway Labor Executives' Association (RLEA) request certain labor protective conditions.

The Commission has determined that an investigation into the proposed abandonment should not be instituted. We are

now issuing a decision on the merits of this proposal under 49 U.S.C. §10904(c)(2). For the reasons discussed below, we approved the abandonment.

*Applicant's Evidence*

C&NW points out that the general physical condition of the line is fair to poor. Although the maximum timetable speed is 30 miles per hour, there are timetable and slow order restrictions of 10 miles per hour for approximately 39 miles. A bridge at MP 50.1 is out of service. C&NW incurred maintenance costs of $116,491 in 1981 and $65,386 in 1982, and it estimates that it would cost $253,230 in 1983 to maintain tracks, bridges, and other facilities to comply with FRA Class I track safety standards.[1]

Revenues on the line decreased from $164,266 in 1981 to $117,941 in 1982 (base year). Avoidable costs decreased at the same time, from $264,448 in 1981 to $171,938 in 1982, allowing C&NW to reduce its losses from $100,182 in 1981 to $53,997 in 1982. Applicant estimates that continued operation of the line would cause it to incur an annual opportunity cost of $327,270, calculated on the basis of 16.7 percent rate of return applied against a net liquidation value of $1,959,698 attributed to the line.

The volume of traffic handled on the line has declined from 207 carloads in 1981 to 130 in 1982.[2] Applicant believes that available traffic on the line is being moved increasingly by carriers of other modes, or has ceased to move entirely. C&NW

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[1] It would not be necessary to restore the out of service bridge, located on a 5.5-mile section of the line no longer in use. The cost of restoration, estimated at over $400,000, is not included.

[2] These figures do not include the bridge traffic handled on the line. The Commission authorized a waiver of the regulations requiring revenue and cost data related to this traffic because it found the traffic would be rerouted and thus retained after abandonment. See decision served November 24, 1982.

indicates alternative transportation is available. Rail service will continue near shippers at each station on the line. Numerous motor carriers also serve the area.

*Protests and Comments*

Five shippers or shipper organizations oppose the relief sought. CENEX of London, WI, blends and sells fertilizer to local cooperatives. In 1982, CENEX received 37 carloads of dry fertilizer. It fears that after the abandonment, most of the fertilizer will have to be trucked from Minnesota points, at an increased cost of $48,824 based on its 1982 traffic. Farm Better Service and Miller Grain, both of Dousman, WI and Lake Mills Feed of Lake Mills, indicate competitive disadvantages resulting from higher transportation costs. CREPACO, of Lake Mills, manufactures chemical tanks, some of which weigh 25 tons, measure 15 feet by 75 feet, and cannot be shipped by another mode. CREPACO requests, if the abandonment is authorized, that we require C&NW to help CREPACO locate a siding within reasonable distance for loading tanks on rail cars, and delay the actual date of abandonment 6 months to allow time for CREPACO to locate and purchase property and relocate and install handling facilities needed for loading the tanks.

Five representatives of four local governments also protest the application. The Town of Cottage Grove witness urges that the line between Waukesha and Cottage Grove be repaired, not abandoned. The President of the Board of the Village of Dousman believes discontinuation of service would have a negative effect on the community. Specifically, if Farm Better Service and Miller Grain ceased operations in the Village, approximately $5,600 in annual taxes would be lost. Light industrial development, which is made attractive by rail service and is provided for in the Village Master Plan

adopted in 1979, would be foreclosed by the abandonment. The witness for County of Jefferson testified that its Board of Supervisors adopted a resolution opposing the abandonment and that increased transportation costs will be a disincentive for new and expanding industry. The Jefferson County Board Supervisor who represents the township of Lake Mills, believes C&NW's application is based upon non-representative years when the economy was poor and should instead have included data from previous years. He also points out that no financial assistance has been requested from state or local governments and generally indicates adverse impacts upon industrial development. The City of Lake Mills filed a Resolution Opposing Railroad Abandonment, indicating that local efforts to market industrial land and promote industrial growth would suffer from the abandonment. Lake Mills also objects to the fact that C&NW has been permitted to exclude from its application "its most profitable business," presumably referring to the bridge traffic waiver authorized by the Commission.

Commentators Timber Lane and Walter Zahn us to determine that the corridor is suitable for public use. WisDot als believes that the properties may be suitable for public use.

WisDot notes that a limited number of Lake Mills rail users have indicated rail dependency and that a state rail assistance loan was rejected by the City of Lake Mills. WisDot's analysis of the proposed abandonment lends support to C&NW's application; it indicates that eliminating bridge traffic revenue clearly leaves insufficient originating and terminating traffic and revenues to offset continuing costs of operation. The principal concern of WisDot, however, is whether the proposed abandonment might have an adverse impact upon the State's

sovereign power of eminent domain, citing a recent decision, *Hayfield and Northern Railroad* v. *Chicago and North Western Transportation Company*, 693 F.2d 819 (8th Cir. 1982). WisDot requests us to find: that if the abandonment is authorized, the issuance of a certificate to the applicant completes all federal rail regulatory interest in the matter; and that all provisions of 49 U.S.C. §10905 have been followed and that the Commission's jurisdiction has ended and does not conflict in any way with subsequent acquisition of the property under State eminent domain authority.

We wish to point out to WisDot that after all conditions to an abandonment have been complied with and the certificate is *effective*, federal interest and Commission jurisdiction end. Mere authorization by issuance of a certificate will not foreclose Commission action if, for example, all conditions are not later complied with. No further consideration will be given to this portion at WisDot's request.

*Conclusions*

In determining whether an application for abandonment should be authorized, we must weigh the burden which continued operations impose upon the railroad and interstate commerce against the burdens which loss of that service will impose upon shippers and community interests.

Applicant's evidence shows that the financial burden on C&NW in continuing to operate the line would grow substantially. C&NW has incurred operating losses on the line in recent years, and those losses will only increase, if service is maintained and the line is kept in a safe operating condition. Although some of the current rail shippers may incur additional costs, if forced to move their products by truck, this situation is not atypical of most abandonments. Inconvenience or increased costs to shippers, standing alone, does not warrant

continuation or a losing operation. *Illinois Central Gulf R. Co.—Abandon.*, 363 I.C.C. 729, 736 (1980). There is only one shipper, CREPACO, that appears to be dependent upon rail service, for the movement of some of its larger, heavier products. CREPACO has not shown by competent evidence, however, that it would be unable to ship its products profitably anyway, or would otherwise be damaged as a result of the abandonment. Furthermore, its request for 6 months additional time to establish new facilities a reasonable distance from rail service shows it has an ability to change operations according to need and possesses some flexibility in short-haul transportation alternatives. It has not presented evidence or justification to delay the abandonment for 6 months, or any other specific period of time. Indeed, since C&NW announced its intention to abandon this line over 5 months ago, CREPACO has had time to make changes in its operations that it believes are necessary.

Moreover, we find no evidence that abandonment will have a substantial adverse impact on rural and community development. The arguments made by the local governments are too speculative when compared with the historical evidence submitted by C&NW.

Three specific arguments need to be addressed. First, the Jefferson County Board Supervisor questions the representativeness of the historical data in the record. He suggests that the line was more profitable in past years. C&NW complied with our regulations which require evidence of the most recent years. The burden shifts to protestants to prove why operations many years ago are more representative of the present and future use of the line than the most recent two years. The Jefferson County Board Supervisor has not met that burden.

The same Jefferson County witness also notes that C&NW

has not requested any financial assistance. We note that in the proper exercise of its management discretion, C&NW was entitled to decide whether it was cost efficient to seek assistance in order to continue operating what is clearly an unprofitable line.

Finally, it is inappropriate for the City of Lake Mills to now question the Commission's waiver of bridge traffic data. The Commission found based on C&NW's representations that this traffic would be retained. Accordingly, it would be inappropriate to consider the effects of that traffic when judging the viability of this line segment.

In light of applicant's evidence, supported by WisDot's conclusion that originating and terminating revenues are insufficient to offset continuing costs of operation, we believe that the burden which continued operation of the line imposes on C&NW and upon interstate commerce outweighs the burdens which the shippers and the community may experience from a loss of the rail service. Authority will be granted for C&NW to abandon the line.

*Environmental Issues*

The environmental and energy impacts of this action have been examined and found not to be significant. Areas of consideration included, but were not limited to, energy consumption, air and water quality, noise levels, and public safety. It was determined that the right-of-way would be suitable for alternative public use following abandonment. Further, as noted above, certain parties herein have expressed an interest in the properties for public use purposes. Therefore, a public use condition will be imposed.

*Labor Protection*

In approving this abandonment we must ensure that affected rail employees are adequately protected. 49 U.S.C. §10903(b)(2). The conditions imposed in *Oregon Short Line*

*R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (*Oregon III*) have been found to satisfy the statutory requirements. The abandonment therefore will be authorized subject to the *Oregon III* conditions.

*We find*:

1. Abandonment of this line will not result in a serious adverse impact on the rural and community development of Waukesha, Jefferson, and Dane Counties, WI.

2. The property is suitable for other public purposes.

3. This action will not significantly affect either the quality of the human environment or conservation of energy resources.

The present and future public convenience and necessity permit the abandonment by the Chicago and North Western Transportation Company of the above-described line of railroad, subject to the conditions for the protection of employees discussed in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) and subject to the further condition that C&NW shall keep intact all of the right-of-way underlying the track, including all bridges and culverts, for a period of 120 days from the date of this certificate and decision to permit any State or local government agency or other interested party to negotiate the acquisition for public use for all or any portion of the right-of-way.

*It is ordered*:

1. Our findings will be published in the *Federal Register* concurrently with the service of this decision. If any person or governmental entity is considering an offer of financial assistance or an offer to purchase the line to allow rail service to be continued, it must tender such offer to the carrier within 10 days following publication. The offer must be filed concurrently with the Commission and the offeror must also comply with 49 CFR §1152.27(b) and 49 U.S.C. §10905.

2. All correspondence to the Commission containing offers of financial assistance for the continued operation or acquisition of this line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Rail Section AB-RSCP."

3. Subject to the conditions set forth above and provided no offer for continued rail operation is received, an appropriate certificate of abandonment shall be issued. Applicant shall not effect abandonment prior to the effective date of the certificate.

4. If abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 days notice to this Commission. When filing schedules canceling tariffs applicable to the line, applicant shall refer to this certificate and decision by date and docket number.

5. If the authority granted by this decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

6. If the authority granted in this certificate and decision is not exercised within 1 year from its effective date, it shall be of no further effect.

7. This certificate shall be effective 30 days from the date of the service unless otherwise ordered by the Commission.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

Agatha L. Mergenovich
Secretary

(SEAL)